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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 1007

ROBERT V. FERRY, IRVING BAKER and AUTRICE COPELAND FREEMAN, *Petitioners,*

v.

STEWART L. UDALL, Secretary of the Interior, et al., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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March 19, 1965.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioners Robert V. Ferry, Irving Baker and Autrice Copeland Freeman hereby pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Ninth Circuit rendered in the above-entitled proceedings on September 9, 1964.[1]

---

[1] In addition to Stewart L. Udall as Secretary of the Interior, the respondents herein include Charles H. Stoddard as Director of the Bureau of Land Management of the Department of the Interior, Fred J. Weiler as Arizona State Director of the Bureau of Land Management of the Department of the Interior, and Roy T. Helmandollar as Manager of the Phoenix Land Office of the Bureau of Land Management of the Department of the Interior.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 336 F. 2d 706 and is reprinted in the appendix hereto, p. 1a, *infra*.

The minute entries of the United States District Court for the District of Arizona are unreported; they are reprinted in the appendix hereto, p. 14a, *infra*.

JURISDICTION

The judgments of the Court of Appeals affirming the summary judgments dismissing petitioners' complaints were entered on September 9, 1964. Timely petitions for rehearing *en banc* were denied on October 21, 1964. On timely application, Mr. Justice Douglas signed an order on January 21, 1965, extending the time for filing this petition to and including March 20, 1965.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Secretary of the Interior, in reliance upon his own regulation (43 CFR 250.5), may in his unreviewable discretion and in the absence of fraud or other irregularity cancel the sale of public land under 43 U.S.C. § 1171 where a qualified bidder therefor has been finally declared to be the purchaser and has paid cash purchase price but where no cash certificate has yet been issued.

2. Whether, under the provisions of 43 U.S.C. § 1171, the declared purchaser of public lands has acquired such an interest and equitable right and title to the

lands so purchased that such interest, right and title can be taken away from him only after administrative notice and hearing and judicial review, particularly where cancellation of the purchase is grounded on an alleged erroneous appraisal so as to constitute a "bad bargain" for the Government.

3. Whether § 10 of the Administrative Procedure Act (5 U.S.C. § 1009) allows judicial review of and relief from the allegedly arbitrary acts of the Secretary of the Interior vacating a sale of public land under the classification and sale provisions of the Taylor Grazing Act (43 U.S.C. §§ 315f, 1171) where the bidder for the land has done all that is required of him under the law and regulations and has been finally declared to be the purchaser of the land.

STATUTES AND REGULATIONS INVOLVED

The statutes involved are § 7 of the Act of June 28, 1934, c. 865, 48 Stat. 1272, and § 14 of the Act of June 28, 1934, c. 865, 48 Stat. 1274, the Act of June 28, 1934, being commonly known as the "Taylor Grazing Act"; § 10 of the Administrative Procedure Act, Act of June 11, 1946, c. 324, 60 Stat. 243.

Section 7 of the Taylor Grazing Act, as amended by the Act of June 26, 1936, c. 842, Title I, § 2, 49 Stat. 1976, now appears as 43 U.S.C. § 315f and provides in pertinent part:

> **§ 315f. Homestead entry within district or withdrawn lands; classification; preferences.**
>
> The Secretary of the Interior is hereby authorized in his discretion, to examine and classify any lands withdrawn or reserved by Executive order of November 26, 1934 (numbered 6910), and amendments thereto, and Executive order of Feb-

ruary 5, 1935 (numbered 6964), or within a grazing district, which are more valuable or suitable for the production of agricultural crops than for the production of native grasses and forage plants, or more valuable or suitable for any other use than for the use provided for under this chapter, * * * and to open such lands to entry, selection, or location for disposal in accordance with such classification under applicable public-land laws, * * *. Such lands shall not be subject to disposition, settlement, or occupation until after the same have been classified and opened to entry: * * *. The applicant, after his entry, selection, or location is allowed, shall be entitled to the possession and use of such lands: *Provided*, That upon the application, of any applicant qualified to make entry, selection, or location, under the public-land laws, filed in the land office of the proper district, the Secretary of the Interior shall cause any tract to be classified, and such application, if allowed by the Secretary of the Interior, shall entitle the applicant to a preference right to enter, select or locate such lands if opened to entry as herein provided.

Section 14 of the Taylor Grazing Act, as amended by the Act of July 30, 1947, c. 383, 61 Stat. 630 now appears as 43 U.S.C. § 1171 under "Sales of Isolated Tracts" and provides in pertinent part:

§ 1171. Sale of isolated or disconnected tracts.

Notwithstanding the provisions of sections 212, 321, 662, 678 and 945 of this title, it shall be lawful for the Secretary of the Interior to order into market and sell at public auction, at the land office of the district in which the land is situated, for not less than the appraised value, any isolated or disconnected tract or parcel of the public domain not exceeding one thousand five hundred and twenty

acres which, in his judgment, it would be proper to expose for sale after at least thirty days' notice by the land office of the district in which such land may be situated: *Provided*, That for a period of not less than thirty days after the highest bid has been received, any owner or owners of contiguous land shall have a preference right to buy the offered lands at such highest bid price, and where two or more persons apply to exercise such preference right the Secretary of the Interior is authorized to make an equitable division of the land among such applicants, but in no case shall the adjacent land owner or owners be required to pay more than three times the appraised price: * * *.

Section 10 of the Administrative Procedure Act, Act of June 11, 1946, c. 324, 60 Stat. 243, 5 U.S.C. § 1009, provides in pertinent part:

§ 1009. Judicial review of agency action.

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.

Rights of review

(a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

Form and venue of proceedings

(b) The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs

of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

Acts reviewable

(c) Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. * * *

* * * * * *

Scope of review

(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; * * *(3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; * * *. In making the foregoing determinations the court shall review the whole record or portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

The regulations involved are 43 CFR 101.8 (revised 1954); 43 CFR 221.37 (adopted in Circular 1950, 21

F. R. 1860, March 27, 1956); 43 CFR 250.5 (revised 1954); and 43 CFR 250.12(c) (revised 1954):

43 CFR 101.8 provides:

§ 101.8. *Allowance of applications discretionary with the Secretary of the Interior.* The exchange of privately owned lands under section 8(b) of the Taylor Grazing Act approved June 28, 1934 (48 Stat. 1272), as amended by the act of June 26, 1936 (49 Stat. 1976; 43 U.S.C. 315g), the ordering of public sales under section 14 of the act (48 Stat. 1274; 43 U.S.C. 1171), and the issuance of leases under section 15 (49 Stat. 1978; 43 U.S.C. 315m), thereof are within the discretionary power of the Secretary of the Interior.

43 CFR 221.37 provides:

§ 221.37. *Finality of decision.* No appeal will lie in the Department from a decision of the Secretary.

43 CFR 250.5 provides:

§ 250.5. *Effect of application.* The filing of an application in conformity with the regulations in this part will not segregate the lands applied for from other application under the public land laws, or defeat a prior valid right initiated under any such law. However, until the issuance of a cash certificate, the authorized officer may at any time determine that the lands should not be sold, the applicant or any bidder has no contractual or other rights as against the United States, and no action taken will create any contractual or other obligation of the United States.

43 CFR 250.12(c) provides:

§ 250.12. *Action after purchaser is declared.*

(c) When there has been full compliance with the regulations in this part, the manager will issue a cash certificate to the purchaser.

STATEMENT

Petitioners seek review of the judgments of the Court of Appeals for the Ninth Circuit. The two cases were consolidated in that Court in the respective appeals of the petitioners from two identical judgments entered by the United States District Court for the District of Arizona granting respondents' motions for summary judgment. See appendix hereto, p. 14a, *infra*.

In both cases the petitioners had sought relief involving the administration and sale of public lands under the provisions of § 14 of the Taylor Grazing Act, 43 U. S. C. § 1171, also known as the Isolated Tracts Act, in the District Court under the Administrative Procedure Act, 5 U. S. C., § 1009. The judgments of the Court of Appeals affirmed the judgments of the District Court by holding: (1) that until issuance of cash certificates, as provided for in 43 CFR 250.5, petitioners acquired no interest in the lands sold to them at the respective sales and the Secretary of the Interior was free to cancel, set aside and vacate said sales at any time and for any reason prior to the issuance of cash certificates, and (2) that the power to determine whether or not to sell public lands remained in the discretion of the Secretary at any time up to the issuance of cash certificates and the exercise of such powers of discretion by the Secretary was not subject to judicial review under the Administrative Procedure Act.

In both cases the Secretary of the Interior, long after the respective sales had been held, refused to complete the sales to each petitioner when he determined in an *ex parte* manner that the fair market value of the tracts on the dates they were offered for sale

substantially exceeded the sums bid for these tracts by petitioners, such determination being made without benefit of prior notice or hearing and long after petitioners had paid their monies for the lands and had been declared to be the purchasers thereof.

1. The Ferry-Baker Case

On April 18, 1958, a sale of certain land was held under the provisions of 43 U.S.C. § 1171, at the Phoenix Land Office of the Bureau of Land Management. Petitioners Ferry and Baker were not applicants in the sense that they did not request that the land involved be set aside. Petitioners learned of the sale through a legal notice of sale (Ferry R. 102). The legal notice setting forth the terms of the sale stated that the appraised value of the land was $24,238.55. The announcement further stated the land would be sold to the highest bidder and contained no reference to any right or reservation on the part of the seller to void the sale or to change the appraisal. The notice contained no reference to any reservation except insofar as "contiguous owners" were concerned. No statute or regulation was referred to in the notice except 43 U.S.C. § 1171. No reference to 43 CFR 250.5, upon which the Secretary later relied, appeared in the notice.

The sale was held and petitioner Robert V. Ferry, acting as agent for the petitioner Irving Baker, bid the sum of $32,500 for the said land, which sum was received and accepted by the Manager of the Phoenix Land Office on April 18, 1958 (Ferry R. 79). The Manager declared in writing that

> ". . . the bid of $32,500. is declared to be the high bid and the land will be sold at that price." (Ferry R. 79).

The only qualification concerned preference right claimants.

Thereafter, one Stanley C. Soho appealed the decision of the Manager on the basis that the sale involved fraud and certain immoral and unethical acts. On October 17, 1958, the Bureau of Land Management, by its director, Edward Woozley, affirmed the Manager's decision, rejecting Mr. Soho's allegations of "fraud or collusion" (Ferry R. 19) and finding as a "decisive factor" that petitioners' bid exceeded the appraised value by $8,000.00, and that "It is clear that the Government's interest has not been prejudiced." (Ferry R. 20).

Mr. Soho then attempted an appeal to the Secretary of the Interior. A decision was handed down by the then Assistant Secretary of the Interior, Roger Ernst, on August 19, 1959, A-28135, Stanley C. Soho, Arizona 015912. (Ferry R. 21-26). The Ernst decision reversed and remanded the October 17, 1958, decision of the Director of the Bureau of Land Management on the basis of Soho's charge of attempted collusion. The Ernst decision concluded:

> "The fact that there was competitive bidding and that the United States would *realize a good price for the land* does not justify a disregard of the moral or ethical factors involved." (Ferry R. 26, emphasis supplied).

Petitioner then petitioned for a reconsideration of the Ernst decision and a hearing was granted. On June 17, 1960, Earl J. Thomas, acting director of the Bureau of Land Management, sent out a Notice of Hearing. (Ferry R. 80-83). This notice clearly indi-

cated that the only issue concerned at the hearing would be the

> ". . . evidence relating to the *validity* of a public sale. . . ." (Ferry R. 80, emphasis supplied).

The hearing was held on August 16, 1960. The testimony at the hearing related principally to the charges previously made by Mr. Soho. The record contains a transcript of that portion of the hearing in which some attempt was made to go into the subject of present (two years and four months after sale) land value. (Ferry R. 84-92). The hearing examiner ruled that the evidence of land value was material but that he would entertain a motion to continue the hearing to obtain rebuttal testimony. (Ferry R. 89). Mr. Kratz, attorney for the Department, then decided not to offer the value evidence and withdrew his expert witness. (Ferry R. 89).

No further hearing was ever held in this case and petitioners have at no time been given any opportunity in the administrative proceedings to offer evidence on the subject of land value.

On July 17, 1961, the Department of the Interior issued an order vacating the sale. (Ferry R. 28-31). The order, signed by the Assistant Secretary of the Interior, John A. Carver, Jr., reviewed the testimony of the August 16, 1960, hearing and concluded that, as to attempted collusion,

> ". . . it seems clear that Soho has failed to prove any attempt by Baker to suppress bidding at the sale. . . . To this extent it is necessary to conclude that the primary basis for the Department's decision of August 19, 1959, has been dispelled." (Ferry R. 31).

The order concluded with the following paragraphs:

> "An examination of the record indicates that the fair market value of the offered land may have been higher than the appraised value at the date of appraisal and there is some evidence that the value may have appreciated between the date of appraisal and the date of the sale six months later. Accordingly, the Bureau of Land Management should review the appraisal and determine whether completion of the sale would be in accordance with the land conservation policy announced by the Secretary on February 14, 1961. If not, the vacation of the sale will stand. None of the parties, of course, has acquired any rights in the land since cash certificate has not been issued. 43 CFR 250.5; *Buck Willcoxson*, A-27402, A-27403 (December 17, 1956); *Alexander David Norton*, A-27040 (March 7, 1955).
>
> "Therefore, the case is remanded for further proceedings consistent with this decision." (Ferry R. 31).

Thereupon, petitioners sought from the Department a reconsideration of that portion of the order of July 17, 1961, dealing with the review of the appraisal and ordering the remand. (Ferry 93-101). The Department, to this date, has made no ruling, nor has it, in any way, replied to this motion for reconsideration.

Petitioners and their attorney were given no notice of any action taken on this matter from the time of the petition for reconsideration until the order dated February 1, 1963, and approved by the Secretary of the Interior, Stewart L. Udall, on March 18, 1963, entitled "Vacation of Sale Affirmed." (Ferry R. 36).

The Secretary there vacated the sale stating that upon a review of the

> "... appraisal of the lands in question as directed [we] have determined that it was not an accurate reflection of the market value of the land at the time the sale was held."

It was further found that a completion of the sale held on April 18, 1958, would not be consistent with the land conservation policy announced on February 14, 1961.

The sum of $32,500.00 paid by petitioners, plus an additional $400.00, was retained by the Department up to and past April 3, 1963, at which time the Government tendered a draft for the sum of $32,900.00 to petitioner Ferry. (Ferry R. 114). This draft was first forwarded to Herbert B. Finn, attorney for petitioners Ferry and Baker, on April 24, 1963. (Ferry R. 112).

Petitioners filed action for judicial review in District Court. Motions for summary judgment were made by both parties. The petitioners filed four affidavits (Ferry R. 63-70), all to the effect that affiants were acquainted with the value of the public land involved in this action at the time of the original appraisal in this action was fair on the basis of the terms involved in the sale in question: that the Department's reappraisal was so false and unreasonable when applied to the terms of the subject sale

> "that such an estimate could only have been arrived at in some capricious, unreasonable and arbitrary manner ..." (Ferry R. 64, 66, 68, 70)

The Secretary submitted no controverting affidavits. The Department simply submitted a copy of its original appraisal and the reappraisal. (Ferry R. 115-164). A close examination of these appraisals show that they support rather than controvert the facts stated in the foregoing affidavits. The reappraisal restated the original evidence, merely adding thereto data as to sales later in date, sales on terms rather than cash, sales of properties more favorable located, and sales of smaller parcels of land.

The evidence submitted with both appraisals supports petitioners' affidavits to the effect the original appraisal accurately reflected the market value of the subject land on the basis of the terms of the sale, to wit: cash bulk sale of 692.53 acres on April 18, 1958.

However, the District Court granted respondents' motion for summary judgment and dismissed petitioners' action. An appeal to the Ninth Circuit followed.

2. The Freeman Case

In April of 1958, at the request of Zeta A. Copeland, deceased husband of petitioner Freeman, 1129.04 acres of public lands near Tucson, Pima County, Arizona, were classified by the state office of the Bureau of Land Management in accordance with § 7 of the Taylor Grazing Act as suitable for disposal under the provisions of § 14 of the Taylor Grazing Act and the appraised value thereof was fixed at $35.00 an acre, or $39,516.40 (Freeman R. 93). On July 8, 1958, notice and order for sale were issued pursuant to said classification and appraisal, and such notice was published

in a Tucson newspaper (Freeman R. 58).[2] On August 28, 1958, the sale was held and the land was sold by the Land Manager to petitioner for $39,517.00 (Freeman R. 102).

Petitioner was declared to be the high bidder and she paid the cash purchase price to the Manager, who issued receipt therefor to her. Within the thirty-day statutory period conflicting claims by persons claiming preference rights under the provisions of 43 U.S.C. § 1171 were filed and after prolonged proceedings in the Department of the Interior the Secretary on October 26, 1960, through his Solicitor, declared Freeman to be the purchaser of the land (Freeman R. 96).

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[2] The published notice did not indicate to the public that there was reserved at any time and for any reason up to the time of issuance of cash certificate the right to vacate and set aside the sale as provided in 43 CFR 250.5. The only reference made to the regulations was this phrase: "For reimbursement to owners of authorized improvement on the lands, payment of cost of publication, and other requirements, see 43 CFR, Part 250". (Freeman R. 58). Since these actions were instituted by petitioners the Secretary has seen fit to amend the provisions of 43 CFR 250.5 and spell out the rights of the Government until cash certificate is issued. The text was amended by Circulars 2095 and 2098 published in the Federal Register Docs. 63-925 and 63-1826 January 29, 1963, and February 20, 1963 (now codified as 43 CFR 2243.2 entitled *Effect of application and award of bid*, April 1, 1964, Supplement) and requires that all public notices of sale under the regulations must now state expressly that the Government will reserve the right to reject any and all bids received at any public sale of lands prior to the issuance of final certificate. The Secretary in adopting the amendment stated in the first amendment published in 28 F. R. 826: "The purpose of this amendment is to inform the public that the Government will reserve the right to reject any and all bids received at any public sale of lands prior to the issuance of final certificate" (Exhibits 7 and 8, Freeman R. 74, 75).

No appeal was taken by the conflicting applicants from this final decision to the courts for judicial review and the decision became final under the provisions of 43 CFR 221.37. However, notwithstanding this final decision, no cash certificate was issued as a result thereof.[3]

On April 14, 1961, a joint decision of the Associate Director and Secretary was rendered and, based upon an unpublished new land conservation program policy of Secretary Udall (Freeman R. 69, 91), the sale of August 28, 1958, was vacated on the ground that the then present value of the land exceeded the bid price by ten times (Freeman R. 94, 95). As a result of Freeman's petition for reconsideration of the decision of April 14, 1961, the Assistant Secretary on February 27, 1962, held the new land conservation policy would be construed and applied to mean that the consummation of a public sale should depend upon whether the amount paid or offered by a successful purchaser was equal to or over the fair market value of the land on the date of the sale rather than to penalize the purchaser for appreciation in value of the offered land occurring after the date of sale. The Assistant Secretary concluded by remanding the case back to the Bureau of Land Management to determine whether the Freeman bid reflected the fair market value of the land

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[3] Such certificates—called cash certificates in cash sales and final certificates in other entries such as homestead, etc.—are not documents which create rights. This Court has said they are simply papers to which a claimant is "entitled" when he "acquires a vested interest" in public lands, *The Yosemite Valley Case*, 15 Wall. 77, 87—they furnish "*prima facie* evidence of an equitable claim upon the government for a patent", *Guaranty Savings Bank* v. *Bladow*, 176 U.S. 448, 454.

on the date of sale, and held that if it did the sale would be reinstated and processed further, but that if it did not the vacation of the sale would stand (Freeman R. 66 and 94).

Thereafter a new appraisal was made by the Bureau of Land Management and as a result thereof the Acting Director and Assistant Secretary on June 8, 1962, confirmed the earlier decision of April 14, 1961, vacating the sale on the grounds a new appraisal of the lands as of the date of sale showed the fair market value of the lands exceeded the bid more than six times (Freeman R. 88). Apparently during the period between February 27 and June 8, 1962, a new appraisal as directed by the Secretary's decision of February 27, 1962, was made of the land. This was a *secret appraisal*, a copy thereof never having been furnished petitioner; nor was the appraisal ever furnished the trial court and it therefore is not a part of the record before this Court. Notwithstanding this fact, the joint decision of June 8, 1962, was based on this *secret appraisal.*

From the decision of June 8, 1962, petitioner on December 12, 1962, filed in the United States District Court for the District of Arizona her complaint to have the District Court review under the Administrative Procedure Act, 5 U.S.C. § 1009, adverse decisions of respondents involving the administration and sale of public lands and for a decree declaring the decisions null and void and directing issuance of cash certificate and patent to petitioner Freeman. As in the Ferry-Baker case, summary judgment for the respondents was entered, the action dismissed and an appeal followed.

REASONS FOR GRANTING THE WRIT

I. THE CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT

In affirming the unqualified discretionary power of the Secretary of the Interior to cancel otherwise lawful sales of public land, where the agreed-upon price has been paid, the court below has reached a result in direct conflict with the applicable decisions of this Court.

As long ago as 1845, this Court declared in *Carroll* v. *Sanford,* 3 How. 441, 461, that the United States "has no right to refuse a patent to a *bona fide* purchaser of land offered for sale" absent fraud or mistake. Once the purchase price has been paid, said Mr. Justice McLean for the Court (3 How. at 460-461), "it was no longer the property of the United States, but of the purchaser. . . . When sold, the government, until the patent shall issue, holds the mere legal title for the land in trust for the purchaser . . ."

This rule has been followed in an unbroken line of decisions by this Court during the past century.[4] Referring to the principle as a "general rule of real estate law," the Court has noted (*Benson Mining Co.* v. *Alta Mining Co.,* 145 U.S. 428, 432) that the rule has been

> ". . . repeatedly applied by this Court to the administration of the affairs of the Land Department of the government; and the ruling has been uniform, that *whenever, in cash sales, the price*

[4] See, e.g., *United States* v. *Hughes,* 11 How. 552, 568; *Witherspoon* v. *Duncan,* 4 Wall. 210, 219; *Atherton* v. *Fowler,* 96 U.S. 513, 518; *Simmons* v. *Wagner,* 101 U.S. 260, 261; *Cornelius* v. *Kessel,* 128 U.S. 456, 460-461; *Benson Mining Co.* v. *Alta Mining Co.,* 145 U.S. 428, 432; *Cameron* v. *United States,* 252 U.S. 450, 460; *Payne* v. *New Mexico,* 255 U.S. 367, 371; *Wyoming* v. *United States,* 255 U.S. 489, 501.

> *has been paid*, or, in other cases, all the conditions of entry performed *the full equitable title has passed,* and only the naked legal title remains in the government in trust for the other party, in whom are vested all the rights and obligations of ownership." [Emphasis added.]

Once the purchase price has been paid, as this Court said in *Simmons* v. *Wagner,* 101 U.S. 260, 261, the right to a patent becomes "vested in a purchaser of public lands," the equivalent, "so far as the government is concerned, to a patent actually issued." The execution and delivery of the patent thereafter "are the mere ministerial acts of the officers charged with that duty." *Ibid.*

Finally, in the 1921 decision in *Wyoming* v. *United States,* 255 U.S. 489, 501, the Court—speaking through Mr. Justice Van Devanter, an acknowledged expert on the administration of the public lands[5]—reiterated that

> ". . . as respects cash entries and entries under the pre-emption, homestead, desert land, and kindred laws, the Land Department always has ruled that if, *when the claimant has done all that he is required to do to entitle him to receive the title,* the land is not known to be mineral, *he acquires a vested right* which no subsequent discovery of mineral will divest or disturb." [Emphasis added.]

And, quoting from *Benson Mining Co., supra,* 431, Mr. Justice Van Devanter repeated that "When the price is paid the right to a patent immediately arises." 255 U.S. at 497.

The determination below that the Secretary of the Interior has unlimited power, prior to the issuance

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[5] Mr. Justice Van Devanter's expertise was acknowledged in *Best* v. *Humboldt Mining Co.,* 371 U.S. 334, 336-337.

of cash certificates, to vacate a sale of public land to a declared purchaser who has paid the agreed-upon price cannot be squared with the foregoing decisions. And the efforts of the court below to distinguish those cases and their impact upon the circumstances of the instant proceedings serve to augment the importance of the questions presented and the appropriateness of review by this Court.

(a) The Attempted Distinction of the Cases

The court below stated (see p. 6a, *infra*) that the aforementioned decisions of this Court are distinguishable since they involved statutes making it mandatory for the Secretary to transfer the land to those who complied with statutory requirements, his discretion being limited to determining whether such requirements had been met. But the instant situation was different, in the eyes of the court below (p. 6a, *infra*), since under the so-called Isolated Tracts Act, 43 U.S.C. § 1171, Congress "has left entirely to the Secretary's discretion whether to dispose of the land or not"—and disposition is said not to finally occur pursuant to regulation (43 CFR 250.5) until a cash certificate has issued.

Such a distinction would appear ineffectual to avoid the controlling impact of this Court's decisions. No one denies that the Secretary has discretion in deciding whether or not to sell or dispose of public lands.[6] The question, rather, involves the legal consequences

[6] As the court below noted, p. 3a, *infra*, the Secretary has discretionary authority under § 1171 to decide whether "in his judgment, it would be proper to expose for sale" any isolated tract of public land. That discretion was exercised in the instant cases when the Secretary decided to classify the lands in question and to offer them for sale.

of an affirmative determination to sell where a bid from a qualified purchaser has been accepted and cash payment of the purchase price has been made. Time and again this Court has ruled that the purchaser thereby acquires a vested equitable title that cannot be divested. And the cash certificate that eventually issues has been described by this Court as a paper to which the purchaser is "entitled" when he "acquires a vested interest" in public lands. *The Yosemite Valley Case*, 15 Wall. 77, 87. The cash certificate, in short, furnishes "*prima facie* evidence of an equitable claim upon the government for a patent." *Guaranty Savings Bank* v. *Bladow*, 176 U.S. 448, 454.

These established principles appear applicable wherever the cash sale system is employed in the disposal of public lands, whatever differences or variations there may be in other aspects of such disposal.[7] As this Court emphasized in the *Wyoming* case, 255 U.S. at 501, "as respects cash entries and entries under the pre-emption, homestead, desert land and kindred laws . . . when the claimant has done all that he is re-

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[7] For example, in the *Wyoming* case Congress rather than the Secretary of the Interior made the initial discretionary decision to offer lands for sale; and Congress rather than the Secretary offered the land to a qualified applicant. But the legal consequences of cash payment by a qualified purchaser would be the same under either method. As was said by the Court, 255 U.S. at 479:

> "Of course the state's right under the selection was precisely the same as if in 1912 it had made a cash entry of the selected land under an applicable statute, for the waiver of its right to the tract in the forest reserve was the equivalent of a cash consideration. And yet it hardly would be suggested that the Commissioner or the Secretary on coming to consider the cash entry could do otherwise than approve it, if at the time it was made the land was open to such an entry and the amount paid was the lawful price."

quired to do to entitle him to receive the title . . . he acquires a vested right which no subsequent discovery of mineral [or presumably a revaluation of the land] will divest or disturb." And since sales under § 1171 are plainly within the cash sale or cash entry system, the principles of the *Wyoming* decision appear applicable. "When the price is paid the right to a patent immediately arises." *Benson Mining Co.* v. *Alta Mining Co., supra,* 431.[8]

Recognition of the vesting of an indefeasible equitable title in petitioners would thus be the inescapable consequence of following this Court's prior decisions. And in the absence of any Congressional language or intent to change that consequence in sales under § 1171, those decisions should be followed. Certainly the distinctions sought to be drawn by the court below merit the full review and consideration of this Court. If so important a change is to be made in the consequence of a cash sale of public land as delineated by this Court in the past, this Court should give the matter its full attention.

(b) The Reliance on the Administrative Regulation

The major effort of the court below to avoid the thrust of this Court's teachings in the *Wyoming* line of cases was concentrated on the interpretation and application of the Secretary's own regulation, 43 CFR

[8] The *Benson* case involved a dispute between applicants for a patent to mineral land and a subsequent locator. Section 2325 of the Revised Statutes provided, with respect to mineral lands, that "it shall be assumed that the applicant is entitled to a patent, upon payment to a proper officer." That statutory provision, which has no counterpart in § 1171, would seem to be a Congressional recognition of the uniform doctrine of this Court, a doctrine applicable even when Congress is silent in a particular instance. Certainly there is no language in § 1171 which purports to void or change that doctrine.

250.5. That regulation provides that "until the issuance of a cash certificate, the authorized officer may at any time determine that the lands should not be sold, the applicant or other bidder has no contractual or other rights as against the United States, and no action taken will create any contractual or other obligation of the United States."

Concededly, the Department of the Interior "has been granted plenary authority over the administration of public lands, including mineral lands; and it has been given broad authority to issue regulations concerning them." *Best* v. *Humboldt Mining Co.*, 371 U.S. 334, 336. But that broad power does not encompass the right to issue regulations which are "inconsistent with law", *United States* v. *Smull*, 236 U.S. 405, 409, or which "enlarge or curtail" statutory rights, *Payne* v. *Central Pac. Ry.*, 255 U.S. 228, 236. Indeed, as was said in *Cornelius* v. *Kessel*, 128 U.S. 456, 461, and repeated in *Ballinger* v. *United States ex rel. Frost*, 216 U.S. 240, 248, the power of the Secretary over public lands "is not an unlimited or an arbitrary power . . . . It cannot be exercised so as to deprive any person of land lawfully entered and paid for. By such entry and payment the purchaser secures a vested interest in the property and a right to a patent therefor, and can no more be deprived of it by order of the Commissioner than he can be deprived by such order of any other lawfully acquired property."

Thus emerge two vital problems with respect to the lower court's reliance on 43 CFR 250.5:

(1) As a matter of interpretation, should not this regulation be read in a manner consistent with this Court's repeated rulings that equitable title does pass to a qualified purchaser who has fully satisfied all requirements and paid cash for the land?

The provision of § 250.5 that "until issuance of a cash certificate, the authorized officer may at any time determine that the lands should not be sold" should be viewed in conjunction with § 250.12(c), which provides that "When there has been full compliance with the regulations in this part, the manager will issue a cash certificate to the purchaser." So read, these regulations suggest that the Secretary intended to vacate or void a sale only where there has not been full compliance with the regulations. But where the high bidder has fully complied with all requirements, has been finally declared to be the purchaser, and has paid cash for the land, "the manager will issue a cash certificate" under § 250.12(c). There would then be no occasion—excepting the discovery of fraud or mistake —for the Secretary to vacate the sale under § 250.5.

Such a reading of the regulations would be consistent, moreover, with the Department's own recognition and approval of the doctrines enunciated by this Court in the *Wyoming* line of cases. Thus in *State of Wisconsin et al.*, 65 I.D. 265 (June 17, 1958), the Department discussed the *Wyoming* and other decisions of this Court and concluded (p. 272):[9]

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[9] See also *John W. Stanton*, 50 I.D. 242 (1924), involving a private relief act authorizing the Secretary *in his discretion* to issue a patent to Stanton upon his payment for land at the rate of $1.25 an acre. The Department, in following *Wyoming*, held (p. 244):

> "In this case *the payment of the purchase price* prescribed by Congress *was the final act prescribed by law as necessary to be performed by Stanton;* and, as the report as to the prospective mineral character of the land was not rendered until after such payment had been made and accepted by the local officers, *Stanton acquired equitable title*, and the burden of showing that the lands were known to be mineral in character at the time of payment shifted to the Government." [Emphasis supplied].

> "The cases which have been discussed appear to establish these principles: Where one has done all that is required of him under a particular statute and has earned equitable title to a tract of public land, nonetheless so long as legal title remains in the United States, the Secretary retains jurisdiction to inquire *into the validity* of disposing of the land to that person. The Secretary, however, can vacate the disposal and refuse to issue patent *only for proper grounds existing prior to or up to the time equitable title was earned.* * * *
>
> "In the case where a disposal can validly be set aside, despite the passage of equitable title, due process permits such action to be taken *only after proper notice and hearing.*" [Emphasis supplied]

The Department has seemed to recognize that once equitable title has passed to a qualified purchaser, the retention of legal title in the United States until issuance of the patent gives the Department the right to vacate a sale only if it was void and "for proper grounds existing prior to or up to the time equitable title was earned." Otherwise, equitable title cannot be voided. And it would be fair to read the Secretary's regulations, §§ 250.5 and 250.12(c), consistently with that administrative analysis.

(2) But if § 250.5 cannot be read, as petitioners suggest, in a manner consistent with the *Wyoming* line of cases, then the ultimate question must be reached—does the Secretary have the power to promulgate a regulation which purports to change the legal consequences of a cash entry system under which, as this Court has repeatedly held, a purchaser acquires equitable title on payment of the cash price?

In 1944, when § 250.5 was first promulgated, there can be no question as to the controlling effect of the

principles enunciated by this Court. But does the Secretary have the power to alter those principles and change the legal consequences attendant upon sales under § 1171—a statute on the books since 1846 (Act of Aug. 3, 1846, 9 Stat. 51)?

In the absence of some pertinent legislative amendment of statutes comprising the cash sale system, there would appear to be most serious doubts whether the Secretary can wholly disrupt the meaning and effect given those statutes by the consistent interpretation of this Court. Particularly are these doubts substantial where the rights at stake have been denominated "vested rights" by this Court. And in light of the statement in *Cornelius* v. *Kessel*, 128 U.S. 456, 461, that the Department cannot exercise its power "so as to deprive any person of land lawfully entered and paid for" or so as to deprive the purchaser of his "vested right in the property and a right to a patent therefor," a most significant question is raised as to the validity of § 250.5 of the Department's regulations.

An additional question as to the validity of § 250.5 is raised by virtue of the provision in 43 U.S.C. § 678, which is of general application, that "at every public sale [of public lands], the highest bidder . . . shall be the purchaser." While 43 U.S.C. § 1171, under which the instant lands were sold, authorizes the Secretary to sell lands "notwithstanding the provisions of section 678 . . .," it seems questionable whether this exception to § 678—which requires that public land be sold at no less than $1.25 an acre—was intended to do other than permit the Secretary to sell isolated tracts of land under § 1171 for less than $1.25 an acre, which he often does. There is nothing in § 1171 which is inconsistent with the mandate of § 678 that the

highest bidder "shall be the purchaser." And the effort of the Secretary by regulation to alter that mandate—in the absence of fraud or mistake—would seem impermissible.

(c) The Willcoxson Case

The court below relied heavily, in reaching its result, upon the decision of the Court of Appeals for the District of Columbia in *Willcoxson* v. *United States*, 313 F. 2d 884. This Court denied certiorari in that case, 373 U.S. 932, No. 983, Oct. Term, 1962.

The *Willcoxson* case, however, involved the discovery of minerals in the land subsequent to the cash sale but prior to the issuance of the cash certificate. The land was thus sold under a gross mistake as to its true nature, making the sale void *ab initio*, a factor not present in the instant cases. The Government here did nothing more than reappraise the land as of the time of the sale and decide that it had made a bad judgment in tendering the land for sale on the basis of a specified appraisal.

But apart from this obvious difference in the cases, the *Willcoxson* decision underlines several important considerations:

(1) The problem as to the legal rights of cash purchasers of public lands is of a recurring nature. The *Willcoxson* decision, combined with the decision below, illustrates that this problem is of growing concern in the administration of the public land laws and thus justifies plenary exploration by this Court.

(2) The court in the *Willcoxson* case promulgated an analysis of the problem which was followed by the court below, an analysis which tends to subvert the principles established by this Court.

By providing in § 250.5 that the authorized land officer may decide not to sell at any time prior to issuance of a cash certificate, said the court in *Willcoxson*, 313 F. 2d at 888, the regulation in effect denotes issuance of the certificate as acceptance of the bid proposal; the situation was then likened to an auction without reserve in ordinary contract parlance. The court below adopted a similar analysis. See p. 5a, *infra*.

But in holding that since the Secretary has discretion to sell he can reject a bid and void a sale up to the point of issuing a cash certificate, the lower courts have undermined the basic concept of cash sales of public land as developed by this Court over the past century. If the Secretary has the freedom, by reference to ordinary contract law or otherwise, to change the legal consequences of the cash sale system and to establish the final acceptance of a cash bid at any point in time he sees fit, then the legal certainty that has long accompanied the public land disposal program is at an end. Legal rights which have always been considered vested on the cash payment of the agreed-upon price become subject to the discretionary whim of the Secretary or his subordinate officer.

The result reached below thus merits the invocation of this Court's full review powers. The decision of the court below simply means that the Secretary can, by postponing what he calls final acceptance of a bid, do away entirely with the concept of equitable title acquired on the payment of cash—a concept engrained in the law by this Court. And by the very language of § 250.5, the Secretary has indicated his intent to do away with all "contractual or other rights as against the United States"—including the equitable title claims long recognized by this Court—prior to the issuance of a cash certificate.

The recent amendment to § 250.5, promulgated in 1963 after the institution of the instant court proceedings,[10] makes the Secretary's challenge to established law even bolder by expressly stating that the Department reserves the right to reject all bids received at any public sale of lands prior to the issuance of final certificate. Such a radical departure from the law should be sanctioned, if at all, only after the most careful scrutiny of this tribunal.

II. THE IMPORTANT AND UNSETTLED QUESTION OF FEDERAL STATUTORY LAW.

The court below, as well as the District of Columbia Court of Appeals in the *Willcoxson* case, *supra,* construed the so-called Isolated Tracts Act, 43 U.S.C. § 1171, and the Secretary's regulation, 43 CFR 250.5, in isolation, without regard to their integral relationship to the Taylor Grazing Act. Act of June 28, 1934, 48 Stat. 1274, 43 U.S.C. § 315, et seq. The failure to read the provisions in their broader and proper setting not only has led to an impermissible result as respects the Secretary's discretionary authority but has created an important question of federal statutory law that has not been but should be settled by this Court.

For many years following its initial appearance on the statute books in 1846, 9 Stat. 51, the Isolated Tracts Act was a separate provision. But in 1934, Congress reenacted it as § 14 of the Taylor Grazing Act, a designation which is still in effect. It is in that setting that § 1171 of Title 43, U.S.C., must be viewed.

The Taylor Grazing Act was basically designed to establish grazing districts amid large areas of public land, thereby controlling the use of the land and pro-

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[10] 43 CFR 2243.2; 28 F.R. 826. See footnote 2, p. 15, *supra.*

tecting against waste through overgrazing and other harmful practices. But throughout the legislative debates on the measure fears were expressed as to the extent of the discretionary powers of the Secretary of the Interior over the establishment of grazing districts and over the administration of the public land disposal laws. See 78 Cong. Rec. 3310, 11140-43 (73rd Cong., 2d Sess.); and see dissenting opinion of Circuit Judge Bazelon in *LaRue* v. *Udall*, 324 F. 2d 428 at 435 (App. D.C.). Congress therefore sought to establish the basic guidelines for grazing control and for disposal of isolated tracts rather than to leave such matters to the unfettered discretion of the Secretary.

Section 14 of the Act—containing essentially the same language as now appears as § 1171 of 43 U.S.C.—was added in the Senate on motion of Senator O'Mahoney of Wyoming. The Senator explained, 78 Cong. Rec. 11150-51 (June 12, 1934), that the purpose of this provision was to enable

> "... the Secretary of the Interior to sell certain isolated tracts which are not suitable for inclusion in grazing districts. It appears that the public-land laws now governing the sale of isolated tracts fix the minimum price of $1.25 an acre on some and $2.50 an acre on others. In view of the fact that the amendment changes the whole system by providing for appraisal, it was deemed advisable to do away with that limitation as to price and also with the limitation as to the amount of acreage a single purchaser may acquire."

As finally enacted, the Taylor Grazing Act gave the Secretary only three discretionary powers:

(1) The power in § 7, now found at 43 U.S.C. § 315f, to examine and classify any lands within grazing dis-

tricts more suitable for crop growing than for producing grasses and forage plants and to open such lands to entry, selection and disposal under applicable public-land laws;

(2) The power in § 8, now found at 43 U.S.C. § 315g, to make certain exchanges of lands within grazing districts with States and private interests; and

(3) The power in § 15, now found at 43 U.S.C. § 315m, to lease isolated tracts outside the grazing districts to the owners of contiguous lands.

Shortly after the passage of the Act, the President on November 26, 1934, issued a temporary withdrawal order withdrawing all vacant unreserved and unappropriated public lands of twelve named Western States from settlement, location, sale or entry pending classification—thereby in effect abrogating the provisions of § 14 authorizing such disposal. See 54 I.D. 539. Reacting to the alarm of Western members, Congress thereafter amended the Taylor Act, particularly § 7 thereof, to authorize the Secretary of the Interior in his discretion to examine and classify lands withdrawn by the 1934 Executive Order, as well as by a subsequent Order in 1935, for uses other than grazing both inside and outside the grazing districts. This amendment now appears as 43 U.S.C. § 315f.

It is thus apparent that Congress carefully limited the discretionary powers of the Secretary in the administration of the Taylor Grazing Act. And the language in § 14 of the Act (43 U.S.C. § 1171)—that the Secretary may order sold that isolated land "which, in his judgment, it would be proper to expose for sale"—can only have reference to his discretionary authority under § 7 of the Act to classify certain types of land

and to dispose of such land "under applicable public-land laws." In other words, this language of § 14, which the court below seized upon as proof of the Secretary's broad discretion to alter the legal nature of the cash sales system (see p. 3a, *infra*), is nothing more than a limited cross-reference to the discretionary classification power under § 7.

Accordingly, before the Secretary can offer isolated tracts for sale under § 14, he must first classify the land as suitable for such a sale and order the land sold in accordance with § 7. That classification and order for sale comprise the outer limits of the discretion which Congress gave the Secretary in connection with isolated land sales. And once he classifies the land as suitable for public sale, has it appraised and offers it for sale (particularly after he has declared the high bidder to be the purchaser), his discretionary powers have some to an end—save only as to the discovery of fraud or gross mistake as to the character of the land.[11] Thereupon the rules established by this Court as to the legal consequences of such a cash sale become of controlling effect.

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[11] At the time of the sales here in question, the Secretary by his own regulation recognized the limits of his discretionary powers under the Taylor Grazing Act. This regulation, 43 CFR 101.8 (1954 ed.), provided:

> "*Allowance of applications discretionary with the Secretary of the Interior.* The exchange of privately owned lands under section 8(b) of the Taylor Grazing Act approved June 28, 1934 (48 Stat. 1272), as amended by the act of June 26, 1936 (49 Stat. 1976; 43 U.S.C. 315g), the ordering of public sales under section 14 of the Act (48 Stat. 1274; 43 U.S.C. 1171), and the issuance of leases under section 15 (49 Stat. 1978; 43 U.S.C. 315m), thereof are within the discretionary power of the Secretary of the Interior."

Thus the problem of statutory construction in this case is of far greater scope than that of interpreting the language of § 14 in isolation, as the court below did. The entire Taylor Grazing Act must be read and construed in relation to the Secretary's discretionary power respecting the sale of isolated tracts, an Act wherein Congress was careful to limit and to spell out precisely the discretion exercisable by the Secretary. So viewing the Act, the conclusion seems inescapable that Congress never intended to give the Secretary discretionary power to repeal the "cash-sale vesting rule" firmly established by this Court.

The statutory problem is of obvious significance in the administration of the Taylor Grazing Act and in the execution of the Congressional intent. Review of the decision below thus becomes appropriate.

III. THE IMPORTANT QUESTIONS UNDER THE ADMINISTRATIVE PROCEDURE ACT

The ruling below that the Secretary, "in his discretion, may refuse to sell for whatever reason he finds adequate" (p. 7a, *infra*) and that such a refusal "is not subject to judicial review" (p. 8a, *infra*) under the Administrative Procedure Act raises highly significant problems as to the right to judicial review. And the result reached would appear to be contrary to the relevant principles of judicial review established by this Court.

To classify the determination not to sell—after a high bid has been accepted from a qualified purchaser and the cash price has been paid—as an unreviewable discretionary act is, of course, to assume the basis point in issue. If the Secretary was bound under the law established by this Court to recognize petitioners' equi-

table titles and to issue patents to them, then his order vacating the sales was not discretionary; it was in plain violation of his powers and hence subject to judicial correction.

On the other hand, even if the Secretary's determination did partake of discretionary action, judicial review is not necessarily foreclosed. In *Ballinger* v. *United States ex rel. Frost,* 216 U.S. 240, 248, where this Court affirmed the action of the lower court in reviewing and disapproving the decision of the Secretary of the Interior not to issue a patent to Indian tribal land, the Court stated:

> "We have no disposition to minimize the authority or control of the Secretary of the Interior, and the court should be reluctant to interfere with his action. But, as said by Mr. Justice Field in Cornelius v. Kessel, 128 U.S. 456, 461: 'The power of supervision and correction is not an unlimited or an arbitrary power. It can be exerted only when the entry was made upon false testimony, or without authority of law. It cannot be exercised so as to deprive any person of land lawfully entered and paid for. By such entry and payment the purchaser secures a vested interest in the property and a right to a patent therefor, and can no more be deprived of it by order of the Commissioner than he can be deprived by such order of any other lawfully acquired property. Any attempted deprivation in that way of such interest will be corrected whenever the matter is presented so that the judiciary can act upon it.' "

And in the earlier decision in *Orchard* v. *Alexander,* 157 U.S. 372, 383, involving the discretionary determination of federal land officers as to the settlement on an improvement of public land under a pre-emption

claim, the Court held that such a determination was subject to judicial review on a claim of arbitrariness. See also *Adams* v. *Witmer,* 271 F. 2d 29 (C.A. 9).

More recently, in *Boesche* v. *Udall,* 373 U.S. 472, 485-486, this Court, in sustaining the discretionary power of the Secretary of the Interior to correct administrative errors by cancelling leases in administrative proceedings, was careful to note that "In so holding we do not open the door to administrative abuses. The regulations of the Department of the Interior provide for adversary proceedings on appeals taken within the department . . . And final action by the Secretary, see 43 CFR § 221.37, has always been subject to judicial review. 30 U.S.C. (Supp. IV, 1963), § 226-2; see, *e.g., Noble* v. *Union River Logging R. Co.,* 147 U.S. 165; *Moore* v. *Robbins,* 96 U.S. 530."

While recognizing that not every discretionary act is beyond the pale of judicial review, the court below ruled that the action of the Secretary in voiding the sales was so "committed to agency action" as to be excluded from the review provisions of § 10 of the Administrative Procedure Act. Quoting from *Panama Canal Co.* v. *Grace Line, Inc.,* 356 U.S. 309, 317, the court felt that this determination involved "matters on which experts may disagree; they involve nice issues of judgment and choice, which require the exercise of informed discretion."

But petitioners' effort to secure judicial review was not bottomed on a debate as to whether it was sound judgment to sell these particular parcels on the basis of specified appraisals, as the court below would have it (see pp. 8a-9a, *infra*). Rather the effort stemmed from claims of arbitrariness and illegality unrelated

to such a nice issue of judgment and choice. Among such claims were:

1. *The claim that the orders vacating the sales were entered without notice or hearing as to the reappraisals.* There was a complete absence of any opportunity for these petitioners to challenge the orders administratively by rebutting the reappraisals. Certainly, where a party has what this Court has described as an equitable interest growing out of a cash sale, "he may not be dispossessed of his equitable rights without due process of law. Due process in such case implies notice and a hearing." *Orchard* v. *Alexander, supra,* 383.

(2) *The claim that the voiding of the sales on the sole ground that the Government had undervalued the land constituted an arbitrary act per se.* This Court has held that the Government cannot avoid a contract merely because it turns out to be a "bad bargain." *United States* v. *Mississippi Valley Generating Co.,* 364 U.S. 520, 565-566; and see *Muschany* v. *United States,* 324 U.S. 49, 66-67. When the United States enters into contractual relationships, its rights and duties are governed generally by the law applicable to contracts between private individuals. *Lynch* v. *United States,* 292 U.S. 571. That principle should be no less true with respect to relationships stemming from sales of public land.

Such a claim, of course, would involve consideration of the unpublished public land conservation policy of the Secretary, promulgated on February 14, 1961, after the sales here in question, which was used as a reason for the sales cancellation. See Freeman R. 69. Under that policy, no land transaction was to be con-

summated if it developed that the Government would not receive full value; no party to such a transaction was to receive a windfall. Whether such a policy could be applied retroactively in these circumstances presents a most substantial and judicially reviewable question, particularly where, as here, the policy is executed through the use of secret, undivulged reappraisals.

(3) *The claim that, under res judicata principles, the Secretary was bound by the final administrative determinations that these petitioners were the purchasers of the lands.* More than two years elapsed from the date of the sale until the final administrative determination that petitioner Freeman, rather than preference-rights claimants, was the purchaser of the land; and the petitioner Ferry was subjected to prolonged administrative proceedings before the final determination was made in his favor as to the alleged unethical bidding. Had such administrative proceedings not been instituted by others than the petitioners and had not the proceedings been so prolonged, petitioners would without doubt have received their cash certificates and patents long prior to the announcement of the new land conservation policy.[12] See Freeman R. 91-92.

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[12] The absurdity of cancelling or ignoring substantial rights accruing upon the cash sale, due to delays in administrative procedures not of the purchaser's doing, was recognized by this Court in *Benson Mining Co.* v. *Alta Mining Co.*, 145 U.S. 428, 431-432:

"When the price is paid the right to a patent immediately arises. If not issued at once, it is because the magnitude of the business in the Land Department causes delay. But such delay, in the mere administration of affairs, does not diminish the rights flowing from the purchase, or cast any additional burdens on the purchaser, or expose him to the assualts of third parties."

In these circumstances, petitioners suggest that, under *res judicata* principles, the final determinations that petitioners were the qualified and proper purchasers of the lands should be binding upon the Secretary. See *Union Oil Co. of California, et al.*, 71 I.D. 169 (April 17, 1964), where the Department recognized the applicability of *res judicata* principles to administrative proceedings; and see *Stockley* v. *United States,* 260 U.S. 432, 544.

Such claims, combined with the charge that the Secretary acted without any competent reappraisal evidence, should be sufficient to warrant judicial review of the Secretary's action under § 10 of the Administrative Procedure Act, even though the action be considered discretionary in nature. And the failure of the courts below to provide such judicial review merits the full consideration of this Court. As this Court said in *United States* v. *Purcell Envelope Co.,* 249 U.S. 313, 318, "There must be a point of time at which discretion is exhausted .... and obligation takes its place." Petitioners' claim that such point had been passed justified judicial consideration.

CONCLUSION

The decision below is palpably erroneous. It disturbs decisions of this Court that for over one hundred years have carefully laid down rules establishing the rights of persons dealing with the Secretary of the Interior. It threatens the economic survival of the Western States and their citizens who are dependent upon the proper administration and disposal of public lands by the Secretary of the Interior.

Over seventy percent of the public lands in the State of Arizona are owned or controlled by the federal government, a large percentage of which is unavailable for acquisition because they are in forest reserves, Indian reservations or other types of withdrawals prohibiting their acquisition under the public land laws. The exploding day-to-day increase in population in the State of Arizona as well as other Western States makes these States appreciably dependent upon the proper administration of the public land laws for their economic welfare. If the sweeping powers of discretion and the exercise thereof are vested in the Secretary in the manner attributed to him by the court below, chaos in the administrative law field will result from the practice established in the present case. No one, including the States which may seek to have their lieu selection and exchange rights satisfied under the existing public land laws, could ever be certain of their rights and interests before the Department of the Interior. These rights have definitely been placed in jeopardy by the decision below. Surely confusion will be among the least of the undesirable results.

In order to avoid these chaotic and catastrophic results, as well as for the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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